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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALLEN V. JAFFE, Plaintiff and Appellant, v. JEFFREY WASSERSTROM, Defendant and Respondent.	E067720 (Super.Ct.No. CIVDS1416645) OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Allen V. Jaffe in pro. per.; Suojanen Law Office and Wayne W. Suojanen for Appellant.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mitzie L. Dobson, and Michael K. Liu for Defendant and Respondent.

Allen V. Jaffe went to a laser eye surgery clinic to have LASIK surgery on his eyes. He was given a consent form, which disclosed various risks of having any laser eye surgery, including not only LASIK but also PRK. The form further disclosed various

differences between LASIK and PRK. Jaffe signed it, consenting to LASIK and denying consent to PRK.

Dr. Jeffrey Wasserstrom was assigned to do the surgery. When he met with Jaffe, however, he refused to perform LASIK, because Jaffe had had a previous LASIK procedure; he said he would only do PRK. Jaffe responded that, in that case, he was canceling the surgery. Dr. Wasserstrom told him, however, that the two procedures were the same, except that PRK had a longer recovery time. In reliance on that statement, Jaffe agreed to PRK. He amended the consent form, this time consenting to PRK.

Dr. Wasserstrom therefore performed PRK on Jaffe. Afterward, Jaffe suffered various ill effects, including blurred vision, halos, and difficulty seeing across a room.

Jaffe then brought this action against Dr. Wasserstrom for fraudulent misrepresentation, lack of informed consent, and medical malpractice. The trial court granted summary judgment against Jaffe and in favor of Dr. Wasserstrom.

Jaffe appeals. For reasons different from the trial court's, we will affirm the summary judgment.

I

FACTUAL BACKGROUND

The following facts are taken from the evidence submitted in support of and in opposition to the motion for summary judgment. Dr. Wasserstrom objected to some of Jaffe's evidence, but the trial court overruled those objections and Dr. Wasserstrom does

not claim that this was error. Hence, we may consider all of the evidence. (See Code Civ. Proc., § 437c, subd. (c).)

According to Dr. Wasserstrom's expert witness, LASIK and PRK are both types of surgery in which a laser is used to reshape the cornea to improve vision.

In LASIK, a flap is cut in the epithelium (the outer layer of the cornea). A laser is applied to the corneal bed, and then the flap is put back in place.

In PRK, a portion of the epithelium is removed. A laser is applied to the corneal bed. The epithelium then grows back. Recovery from PRK takes "a few" more days than from LASIK.

Around 2007, Jaffe had had LASIK surgery on both eyes, with "a very successful result." As of 2013, he was interested in having "tune up" LASIK. He consulted with Lasik Vision Institute, LLC (Institute). The Institute scheduled him for LASIK, to be performed by Dr. Wasserstrom, an ophthalmic surgeon.

On November 9, 2013, Jaffe arrived at the Institute. He signed a consent form consenting to LASIK. The consent form disclosed a number of potential complications of having "laser vision correction" (i.e., either LASIK or PRK). It also stated:

"Patients undergoing LASIK: The surgeon will use a special instrument called a microkeratome to create a corneal flap . . . in the cornea. The flap will be lifted up to expose tissue just below the cornea's surface. The surgeon will then use the excimer laser to reshape your cornea. The flap is then replaced in its original position and remains in position by natural adhesion until healing is completed.

"Patients undergoing PRK: The surgeon will either (a) remove the outer layer of corneal skin (either with the laser, by wiping with a special instrument or using a small rotating brush) or (b) create a very thin flap of corneal skin with an alcohol solution . . . . The surgeon will use the method he or she feels is appropriate for you. With the top layer of cornea skin removed, the surgeon will then use the excimer laser to reshape the surface of your eye. A soft contact lens that acts as a bandage will be placed on your eye(s) to aid in healing and comfort. The contact lens is usually removed 3-4 days after the procedure."

When Jaffe met with Dr. Wasserstrom, however, Dr. Wasserstrom refused to perform LASIK on him, saying he did not perform LASIK on patients who have had a prior LASIK procedure. He explained that he did not want to take the chance that the prior procedure may have left epithelial scars. He said he would do PRK instead. Jaffe responded that, in that case, he was going to cancel the surgery entirely, because he wanted LASIK.

Dr. Wasserstrom got up and started walking toward the door, "as though [their] relationship was concluded." Jaffe claims he "was under great duress; either consent to PRK or go home." Dr. Wasserstrom then turned back, however, and told Jaffe that that "it made no difference. It was the same surgery, using the same laser. He said the only difference was a five-day recovery period." Because his previous LASIK had gone so well, and "because [he] was under duress," Jaffe found this statement to be very reassuring.

In reliance on this statement, Jaffe agreed to have Dr. Wasserstrom perform PRK. At a staff member's request, Jaffe hand-corrected the consent form that he had previously signed so as to withdraw his consent to LASIK and to give consent to PRK. Dr. Wasserstrom did not discuss the consent form with him, and he was not given a copy of the consent form.

Dr. Wasserstrom did not discuss the risks of PRK with Jaffe. Their entire meeting lasted three or four minutes.

Dr. Wasserstrom then proceeded to perform PRK on Jaffe. As soon as the anesthesia wore off, Jaffe had "excruciating pain, excruciating light sensitivity." He experienced blurred vision, halos that reduced his ability to drive at night, headaches and fatigue while reading and watching TV, diminished ability to see across the room, and dry eyes.

Dr. Jonathan Davidorf, a board-certified ophthalmologist, testified for Dr. Wasserstrom as an expert on LASIK and PRK. According to Dr. Davidorf, "[t]he risks associated with the application of an excimer laser to treat the cornea are the same with both LASIK and PRK."

He opined that "the care and treatment provided by Dr. Wasserstrom to Mr. Jaffe at all times complied with the standard of care for [o]phthalmologists under the circumstances." He likewise opined that "the informed consent Dr. Wasserstrom obtained from . . . Jaffe was appropriate and within the standard of care." Finally, he

opined that "no negligent act or omission on behalf of [Dr.] Wasserstrom . . . led to . . . Jaffe's alleged injuries."

II

PROCEDURAL BACKGROUND

Jaffe filed this action against Dr. Wasserstrom in 2014.[1] Following a series of demurrers and amended complaints, the operative (second amended) complaint asserted three causes of action: (1) the first cause of action, for fraudulent misrepresentation; (2) the fifth cause of action, for lack of informed consent; and (3) the seventh cause of action, for medical malpractice.

Dr. Wasserstrom filed a motion for summary judgment. In it, he argued, among other things, that:

1. Jaffe could not prove that Dr. Wasserstrom caused his injuries.

2. Jaffe could not prove the elements of fraudulent misrepresentation.

3. Jaffe gave informed consent to PRK.

On September 6, 2016, the trial court granted the motion. Regarding the fraudulent misrepresentation cause of action, it ruled that "there was no material misrepresentation by [Dr. Wasserstrom]." Regarding the lack of informed consent and medical malpractice causes of action, it ruled that "[Jaffe] has not provided any expert

[1] Jaffe also named the Institute as a defendant. On May 9, 2016, the trial court entered summary judgment in favor of the Institute. Jaffe did not appeal from that judgment.

testimony either that the lack of an informed consent or any alleged medical malpractice was a cause of his injuries."

On October 20, 2016, the trial court entered judgment against Jaffe and in favor of Dr. Wasserstrom.

On November 30, 2016, Jaffe filed a motion to vacate the judgment. (Code Civ. Proc., § 473, subd. (b).) On January 9, 2017, the trial court denied the motion. On February 8, 2017, Jaffe filed a notice of appeal.

III

THE TIMELINESS OF THE APPEAL

Dr. Wasserstrom contends that the appeal is untimely. First, he argues that the notice of appeal was not timely, as measured from notice of entry. Second, he argues that Jaffe's motion to vacate the judgment did not extend the time to appeal, because it was not valid.

Jaffe does not respond to Dr. Wasserstrom's first argument. He does argue, however, that his motion to vacate was valid.

"Unless . . . [California Rules of Court,] rule[] 8.108 . . . provide[s] otherwise, a notice of appeal must be filed on or before the earliest of:

"(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served;

"(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or

"(C) 180 days after entry of judgment." (Cal. Rules of Court, rule 8.104(a)(1).)

However, "[i]f, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files . . . a valid motion . . . to vacate the judgment, the time to appeal from the judgment is extended . . . until the earliest of:

"(1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;

"(2) 90 days after the first . . . motion . . . is filed; or

"(3) 180 days after entry of judgment." (Cal. Rules of Court, rule 8.108(c).)

Here, the trial court entered judgment on October 20, 2016. As far as the record reflects, neither the trial court nor Dr. Wasserstrom ever served Jaffe with a notice of entry of judgment. Accordingly, Jaffe had until April 18, 2017 (180 days after entry of judgment) to appeal. His notice of appeal, filed on February 8, 2017, was safely within this time.

Dr. Wasserstrom tries to hang his hat on the fact that, on October 5, 2016, he served Jaffe with what he claims was a notice of the order granting the motion for summary judgment. He argues that Jaffe had to file a notice of appeal within 60 days from this date.

Actually, the document that he cites was a proposed judgment. Dr. Wasserstrom had already served Jaffe with a notice of the order granting the motion for summary judgment, about a month earlier.

However, it does not matter how this document is described.[2] Quite simply, because it was served on October 5, 2016, it could not start the time to appeal from the judgment entered on October 20, 2016. The order granting summary judgment was not appealable (*Dang v. Maruichi American Corp.* (2016) 3 Cal.App.5th 604, 608, fn. 1); thus, a notice of its entry could not start the time to appeal. And a proposed judgment is not a notice of entry of anything; thus, it, too, could not start the time to appeal.

We do have some reservations about Jaffe's candor with this court. His notice of appeal did not specify the date of the judgment or order from which he was appealing. His Civil Case Information Statement, however, indicated that he was appealing from an order dated September 6, 2016 — i.e., the nonappealable order granting summary judgment. We therefore ordered him: "[I]f it is appellant's intention to appeal from a judgment in favor of [Dr.] Jeffrey Wasserstrom, appellant is DIRECTED to serve and file a file-stamped copy of the judgment with the clerk of this court . . . ." Jaffe did not do so. Instead, he filed a letter stating that he was appealing from the January 9, 2017 order

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[2] Jaffe almost manages to shoot himself in the foot. In the index to his appellant's appendix, he describes the document filed on October 20, 2016 as a "Judgment *and Notice of Entry of Judgment*." (Italics added.) If it were, his appeal would not be timely. However, it is strictly a judgment.

denying the motion to vacate. The only reasonable conclusion from all this was that he was *not* appealing from the judgment.

While we do not approve of this misdirection, we are not aware of any authority for holding that Jaffe is bound by it. Judicial estoppel does not apply; we did not adopt or accept his representations that he was not appealing from the judgment. (See generally *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.) Likewise, equitable estoppel does not apply; Dr. Wasserstrom has not claimed that he relied on these representations. As already discussed, the notice of appeal was timely with respect to the judgment, and it did state that Jaffe was appealing from "[a] judgment after an order granting a summary judgment motion." The notice must be liberally construed. (Cal. Rules of Court, rule 8.100(a)(2).)

Because we conclude that the appeal is timely as measured from the entry of the judgment, we need not decide whether the motion to vacate was "valid" so as to extend the time to appeal.

IV

THE STANDARD OF REVIEW

"A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden . . . if' he 'has shown that one or more elements of the cause of action . . . cannot be established,

or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto . . . .' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

"Whether the trial court erred by granting [the] motion for summary judgment is a question of law we review de novo. [Citation.]" (*Samara v. Matar* (2018) 5 Cal.5th 322, 338.)

V

FRAUDLENT MISREPRESENTATION

With respect to his fraudulent misrepresentation cause of action, Jaffe contends there was a triable issue of fact as to whether Dr. Wasserstrom's representation that LASIK and PRK were the same was true.

A. *Additional Factual and Procedural Background.*

The operative complaint alleged that Dr. Wasserstrom falsely represented "that PRK surgery was the same as Lasik surgery except for a 5 day longer recovery period

. . . ."[3] The trial court ruled, however, that "there was no material misrepresentation by [Dr. Wasserstrom]. The distinction between the two procedures was the preparation, not the procedure itself, and the recovery time, specifically the extra five days for the epithelium to grow back. [Jaffe] admits he was told about the longer recovery period . . . ."

B. *Discussion*.

There was ample evidence that LASIK was significantly different from PRK. Dr. Davidorf, Dr. Wasserstrom's own expert, testified that in LASIK, a flap is made in the epithelium and then replaced, whereas in PRK, a portion of the epithelium is removed entirely and then left to grow back on its own. That is *why* the recovery time is longer. The consent form that Jaffe had to sign said the same thing.[4] And Dr. Wasserstrom's own separate statement said the same thing.

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[3] The fraudulent misrepresentation cause of action also alleged that Dr. Wasserstrom "fraudulently concealed the risks and dangers of PRK surgery . . . ." This allegation overlaps the lack of informed consent cause of action, which we will discuss in part VI, *post*.

In opposition to the motion for summary judgment, Jaffe claimed that his fraudulent misrepresentation cause of action was also based on Dr. Wasserstrom's representation (allegedly false) that he did not do LASIK on patients who had had LASIK before. "[A] summary judgment motion is directed to the issues framed by the pleadings. [Citation.] Accordingly, the burden of a defendant moving for summary judgment only requires that he or she negate a plaintiff's theories of liability *as alleged in the complaint*. [Citation.]" (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102.) The trial court therefore could not consider this new theory.

[4] Both sides introduced the consent form; neither side offered it solely for a limited purpose nor objected to it on hearsay (or any other) grounds. In any event, it

At Dr. Wasserstrom's urging, the trial court bought into the notion that any difference in the "preparation" (i.e., opening the eye) was irrelevant, because the "procedure" (i.e., applying the laser) was the same. This was a false dichotomy. The evidence showed that LASIK consisted of one way of opening the eye, followed by the application of a laser, followed by one way of healing the wound; and that PRK consisted of *different* way of opening the eye, followed by the *same* application of a laser, followed by a *different* way of healing the wound. This meant they were different. At a minimum, even assuming the opposite inference was possible, a jury could reasonably infer that Dr. Wasserstrom's statement that "it made no difference" because it was all "the same surgery" was false.

Dr. Wasserstrom also argues, however, that Jaffe failed to prove the other elements of fraud — knowledge of falsity, intent to induce reliance, justifiable reliance, and resulting damage. (See generally *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) The trial court did not decide these issues.

"We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. [Citation.]" (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.) But "[b]efore a reviewing court affirms an order granting summary judgment or summary

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[footnote continued from previous page]
would appear to be an adoptive and/or authorized admission by Dr. Wasserstrom. (Evid. Code, §§ 1221, 1222.)

adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." (Code Civ. Proc., § 437c, subd. (m)(2).)

On a motion for summary judgment, Jaffe had no duty to prove any of these elements unless and until Dr. Wasserstrom carried his initial burden to disprove that element. (Code Civ. Proc., § 437c, subd. (p)(2).) Dr. Wasserstrom clearly did move for summary judgment on the ground that he could disprove falsity, and he clearly did at least attempt to do so. It is less clear that he actually moved for summary judgment on any of these other grounds. However, the motion did devote a paragraph to the plaintiff's need to prove justifiable reliance. It then recited a number of facts, including that "Mr. Jaffe's signed consent clearly laid out the differences between LASIK and PRK, and explained the risks and post-surgical recovery expectations." This fact was also set forth in Dr. Wasserstrom's separate statement. Thus, the motion did raise the question of whether Jaffe's reliance was reasonable in light of the consent form.

Even though the trial court did not rely on this ground, further briefing is not required, because Dr. Wasserstrom raised justifiable reliance in his respondent's brief, and Jaffe addressed the issue in his reply brief. (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 319, fn. 6.)

Several cases hold that a plaintiff cannot justifiably rely on an alleged oral misrepresentation when that misrepresentation is contradicted by a document that the plaintiff signed.

In *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, a terminated employee sued his former employer for (among other things) fraud, alleging that the employer falsely promised that he would not be terminated without good cause. (*Id*. at p. 393.) Before he was hired, however, he read, signed, and returned a letter stating that his employment was at will. (*Id*. at p. 388.) The Supreme Court held that the employer was entitled to summary judgment because, on these facts, the employee could not show justifiable reliance. (*Id*. at pp. 393-394.)

Similarly, in *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, the plaintiffs claimed that they bought an insurance policy in reliance on the salesman's fraudulent representation that it provided coverage that was "'as good [as] if not better'" than coverage under their previous policy. (*Id*. at p. 1581.) The policy itself revealed that it actually offered less coverage. (*Id*. at pp. 1588-1589.) The insureds claimed that they did not read the policy. (*Id*. at p. 1587.) The appellate court nevertheless held that the insurance company was entitled to a nonsuit on the fraud cause of action, because, in light of the policy terms, the plaintiffs failed to prove justifiable reliance. (*Id*. at pp. 1586-1589.)

Here, Dr. Wasserstrom disproved justifiable reliance by showing that Jaffe signed a consent form that fully and fairly disclosed the difference between LASIK and PRK. This shifted the burden to Jaffe to raise a triable issue of fact concerning justifiable reliance. Jaffe never claimed that he did not actually read the consent form. Even had he done so, under *Hadland*, his reliance still would not be justifiable.

Thus, the trial court properly entered summary judgment on the fraudulent misrepresentation cause of action.

VI

LACK OF INFORMED CONSENT

With respect to his lack of informed consent cause of action, Jaffe contends there was a triable issue of fact as to causation.

A. *Additional Factual and Procedural Background.*

The operative complaint alleged that Dr. Wasserstrom intentionally concealed the risks of PRK. It further alleged that "[i]f . . . Jaffe had been adequately informed of the inherent risks associated with the PRK surgery . . . Jaffe would not have consented to the PRK surgery and suffered his injuries."[5]

Dr. Davidorf testified, based on his review of Jaffe's medical records, that "Mr. Jaffe experienced a good outcome from laser refractive surgery performed by Dr. Wasserstrom. . . . The left eye which was treated to be a good reading eye had near vision of J1 without correction which is excellent reading vision. The right eye which was treated to have good distance vision had a visual acuity in the 20/30 range without

[5] In this appeal, Jaffe implies (but does not affirmatively argue) that Dr. Wasserstrom should also have informed him that (1) he was an independent contractor, not an employee of the Institute, (2) he performed procedures for a fixed fee, and (3) he was due to operate on 11 other patients that same day. Once again (see fn. 3, *ante*), because Jaffe did not plead these theories, he could not use them to avoid summary judgment.

correction." He also opined that "no negligent act or omission on behalf of Dr. Wasserstrom led to . . . Jaffe's alleged injuries."

In opposition to the motion, Jaffe testified: "Following the PRK surgery, I became aware of several injuries to my eyes, including but not limited to: haloes that have substantially reduced my ability to drive at night; headaches and fatigue while reading and watching TV; diminished ability to see across the room, dry eyes, blurred vision."

The trial court granted the motion for summary judgment on the lack of informed consent cause of action on the ground that Jaffe had not introduced expert testimony as to causation: "Causation must be proven within a reasonable medical probability based upon competent expert testimony." "Plaintiff has not provided any expert testimony . . . that the lack of an informed consent . . . was a cause of his injuries. . . . According to Defendant's expert, Plaintiff experienced a good outcome with the PRK surgery on November 9, 2013. This expert opinion is not rebutted by Plaintiff."

B. *Discussion.*

The expert testimony that Jaffe has a "good outcome" was sufficient to carry Dr. Wasserstrom's initial burden of disproving the existence of an injury. Jaffe then testified, however, that after the PRK, he experienced halos, headaches, fatigue, diminished ability to see, dry eyes, and blurred vision.

His medical records confirmed this. They showed that, four weeks after the surgery, his vision in one eye was still "very blurry." About six weeks after the surgery, he was seeing halos; he found it "hard to see [a] T.V. screen" and "hard to see at night."

Three months after the surgery — which was as far as the records went — he was "unhappy" with the clarity of his vision; he "[could]n't see as well as before," he "ha[d] to hold reading material closer than before," and he experienced "glare" at night.[6]

"To establish causation in informed consent litigation, the plaintiff must show that a prudent person in the plaintiff's position would not have agreed to the procedure if he or she had been properly informed. [Citations.]" (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1311.) It also requires the plaintiff to show that he or she was injured, and that the procedure caused this injury. (See CACI No. 550.)

The subissue of whether the procedure caused the plaintiff's injury requires expert testimony. (See *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 [medical malpractice action].) The subissue of whether a reasonably prudent person would have agreed to the procedure may or may not require expert testimony, depending on the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1190-1192.) However, we know of no authority that expert testimony is required to prove the subissue of whether the plaintiff *had* an injury, at least when the claimed injury would be apparent to a layperson.

Dr. Wasserstrom cites *Jambazian v. Borden* (1994) 25 Cal.App.4th 836. There, the plaintiff suffered an infection after foot surgery. (*Id.* at p. 841.) He claimed that he

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6 After the surgery, Jaffe was found to have an "early" cataract in each eye. Dr. Davidorf testified that this was due to age and not due to the PRK. It is inferable that the cataracts were causing some of Jaffe's symptoms. However, there was no expert testimony to that effect, and the opposite inference is also reasonable.

was a diabetic, and that the surgeon failed to warn him that having diabetes exposed him to a greater risk of a post-operative infection. (*Id*. at p. 842.) The appellate court held that the trial court properly granted summary judgment for the surgeon, because the surgeon introduced expert testimony that the plaintiff did not have diabetes, and the plaintiff did not introduce expert testimony that he did. (*Id*. at pp. 845-850.)

Jambazian is inapt for two reasons. First, there, the plaintiff was not claiming that the defendant caused his diabetes; rather, the plaintiff's diabetes, if any, was relevant solely to the scope of the defendant's duty to provide information. Second, a layperson is not qualified to diagnose his or her own diabetes. Here, by contrast, Jaffe was qualified to testify, based on his own perceptions, that his vision deteriorated. (Evid. Code, § 800.) Thus, this testimony was sufficient to raise a triable issue of fact regarding the existence of an injury.

Turning to whether Dr. Wasserstrom caused these injuries, Dr. Wasserstrom did not carry his burden of proof. Dr. Davidorf testified that "no negligent act or omission on behalf of Dr. Wasserstrom led to . . . Jaffe's alleged injuries." This statement, however, was ambiguous in two respects. First, did it mean that Dr. Wasserstrom may have been negligent, but he did not cause Jaffe's injuries, or did it mean that he may have caused Jaffe's injuries, but he was not negligent? Second, did it refer exclusively to negligence, or did it also encompass lack of informed consent? We recognize that, as a technical legal matter, a doctor's failure to obtain informed consent under the circumstances here is

a species of medical negligence. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 240-241.)[7] However, it is not medical negligence as commonly conceived; here, Dr. Wasserstrom may have performed the PRK flawlessly, but he could still be liable for failing to disclose the risks beforehand. On a motion for summary judgment, both ambiguities must be construed in Jaffe's favor. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 178.) When viewed in that light, Dr. Davidorf's declaration simply did not negate causation.

Separately and alternatively, Dr. Davidorf did not explain how he came to this conclusion. "It is well settled that, where an expert declaration does not provide the facts upon which its conclusions are based and a reasoned explanation of how such facts led to the conclusions, it 'does not establish the absence of a material fact issue for trial, as required for summary judgment.' [Citation.]" (*Doe v. Good Samaritan Hospital* (2018) 23 Cal.App.5th 653, 656.)

Hence, Dr. Wasserstrom failed to show, beyond a triable issue of fact, that a failure on his part to obtain informed consent (if any) did not cause Jaffe's claimed injuries.

Dr. Wasserstrom also argues, however, that the fact that Jaffe signed the consent form shows that Jaffe did give informed consent. Once again (see part V.B, *ante*), the trial court did not rely on this ground. Nevertheless, we may reach it without the need for

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[7] It has also been characterized as a breach of fiduciary duty. (E.g., *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164-1165.)

supplemental briefing, because Dr. Wasserstrom raised it below as well as in his respondent's brief, and Jaffe addressed it in his reply brief.

"[A]n action for failure to obtain informed consent lies where 'an *undisclosed* inherent complication . . . occurs' [citation], not where a disclosed complication occurs." (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1202.)

Here, the consent form was provided to Jaffe, and he signed it. As noted in part V.B, *ante*, it disclosed the differences between LASIK and PRK. It also discussed the alternatives to having either procedure. It provided lengthy disclosures about the risks of both procedures, which included sensitivity to light, glare, halos, blurriness, a reduced ability to see close up, and dry eyes. It indicated that the risks of the two procedures were the same.

Jaffe does not claim that he suffered any injury that the consent form did not disclose. Quite the contrary — he affirmatively argues that "the 'informed consent' form . . . made clear that the adverse effects suffered by Mr. Jaffe were common side effects of PRK surgery." He also says the "consent form . . . states that *all* of these injuries are well-known side effects of PRK surgery." (Italics added.)

Thus, this evidence was sufficient to carry Dr. Wasserstrom's burden of showing that all of the complications that Jaffe ultimately experienced were, in fact, disclosed.

The only counterargument in Jaffe's briefs is that "[a] contract is void or voidable if obtained through fraud or concealment," and therefore his consent was "vitiate[d]" by

Dr. Wasserstrom's statement that there is no difference between LASIK and PRK.[8] As we held in part V.B, *ante*, however, this statement was false, but it was not fraudulent because Jaffe's reliance was not justifiable.

At oral argument, Jaffe argued for the first time that a doctor cannot delegate his or her duty to obtain informed consent, citing *Shinal v. Toms* (2017) 640 Pa. 295 [162 A.3d 429], He concluded that Dr. Wasserstrom could not fulfill his duty by providing the consent form. "An appellate court is not required to consider any point made for the first time at oral argument, and it will be deemed waived. [Citation.]" (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356, fn. 6.)

Alternatively, even if not forfeited, it lacks merit. It is true that in *Shinal*, the Pennsylvania Supreme Court held — by a bare four-to-three majority — that "the duty to obtain a patient's informed consent is a non-delegable duty owed by the physician conducting the surgery or treatment" (*Shinal v. Toms, supra*, 640 Pa. at p. 334), and therefore "a physician cannot rely upon a subordinate to disclose the information required to obtain informed consent." (*Id*. at p. 335.) The dissenting justices disagreed, stating, "a prohibition on the delegation of this duty does not mean that a physician is precluded from utilizing a qualified member of his staff to aid in fulfilling the physician's duty to obtain a patient's informed consent." (*Id*. at p. 341 [dis. opn. of Baer, J.].) "To hold

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[8] We deem him to have forfeited any other counterarguments, including but not limited to an argument that he was acting under duress.

otherwise improperly injects the judiciary into the day-to-day tasks of physicians . . . and fails to acknowledge the reality of the practice of medicine." (*Id*. at p. 343.)

We find the dissent more persuasive than the majority. A rule that the duty to obtain informed consent is "nondelegable" merely means that (1) a physician cannot avoid liability by delegating the task of obtaining informed consent to a nonphysician, and/or (2) a nonphysician to whom the task has been delegated cannot be held liable to the patient for failing to perform it. It does not mean that a physician must obtain informed consent *personally*. Any such rule would not only be impractical, it would be counterproductive. Arguably, there must be an opportunity for the patient to ask the physician questions; here, however, Jaffe had that opportunity when he met with Dr. Wasserstrom, after reading the consent form and before revising it to give consent to PRK.

In any event, California law is already inconsistent with *Shinal*. For example, it has been held that "[a] hospital's general consent form is obtained for the benefit of all medical personnel treating a patient, and those personnel are entitled to rely on the general consent. [Citation.]" (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1497.)

For these reasons, the trial court properly granted summary judgment on the cause of action for lack of informed consent.

VII

MEDICAL MALPRACTICE

Jaffe's brief could be clearer about whether he is challenging the summary judgment on his medical malpractice cause of action.

At one point, he states: "At issue in this appeal is the propriety of the trial court's October 20, 2016 judgment against Mr. Jaffe on his three remaining claims," specifically including the "7th Cause of Action for 'Medical Malpractice.'"

The headings of his arguments, however, state, as relevant here, "The trial court erred by summarily adjudicating Mr. Jaffe's 1st cause of action for fraudulent misrepresentation," and "The trial court erred by summarily adjudicating Mr. Jaffe's 5th cause of action for lack of informed consent." (Capitalization altered.) There is no heading relating to the seventh cause of action for medical malpractice.

"By rule, an appellant's brief must '[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.' (Cal. Rules of Court, rule 8.204(a)(1)(B).) When a potential issue or argument is not presented to an appellate court in a separate heading or subheading, that issue or argument is deemed forfeited. [Citations.]" (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1077.)

Some of Jaffe's arguments (e.g., as to causation) arguably could be stretched to apply to the medical malpractice cause of action. However, he never actually argues that the trial court erred by summarily adjudicating this cause of action.

Finally, in his conclusion, he states: "Petitioner respectfully requests that this court . . . reverse the summary judgment against Mr. Jaffe as to the causes of action in his Second Amended Complaint for Fraudulent Misrepresentation (1st Cause of Action) and Lack of Informed Consent (5th Cause of Action) . . . ." He does not request reversal of the summary judgment on the medical malpractice cause of action.

We therefore conclude that Jaffe is not seeking — and indeed has forfeited — any appellate contention regarding the medical malpractice cause of action.

VIII

DISPOSITION

The judgment is affirmed. Dr. Wasserstrom is awarded costs on appeal against Jaffe.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.